No. 07-12

In the Supreme Court of the United States

WILLIAM TEJEDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was required to apply a rebuttable presumption that a "throat-slitting gesture" witnessed by two members of petitioner's jury was prejudicial.

2. Whether petitioner's within-Guidelines sentence was reasonable.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Alabama v. *Smith*, 490 U.S. 794 (1989) 7
Dennis v. *United States*, 339 U.S. 162 (1950) 13
Johnson v. *United States*, 520 U.S. 461 (1997) 11
King v. *Bowersox*, 291 F.3d 539 (8th Cir.), cert. denied, 537 U.S. 1093 (2002) 8, 10
McNair v. *Campbell*, 416 F.3d 1291 (11th Cir. 2005), cert. denied, 547 U.S. 1073 (2006) 9
North Carolina v. *Pearce*, 358 U.S. 711 (1969) 7
Remmer v. *United States*, 347 U.S. 227 (1954) 4, 6
Rita v. *United States*, 127 S. Ct. 2456 (2007) 13
Smith v. *Phillips*, 455 U.S. 209 (1982) 7, 12, 13
Stockton v. *Virginia*, 852 F.2d 740 (4th Cir. 1988), cert. denied, 489 U.S. 1071 (1989) 10
Texas v. *McCullough*, 475 U.S. 134 (1986) 7
United States v. *Booker*, 543 U.S. 220 (2005) 13
United States v. *Boylan*, 898 F.2d 230 (1st Cir.), cert. denied, 498 U.S. 849 (1990) 8

Cases—Continued: Page

United States v. *Bradshaw*, 281 F.3d 278 (1st Cir.), cert. denied, 537 U.S. 1049 (2002) 8
United States v. *Console*, 13 F.3d 641 (3d Cir. 1993), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994) .. 10
United States v. *De La Vega*, 913 F.2d 861 (11th Cir. 1990), cert. denied, 500 U.S. 916 (1991) 9
United States v. *Greer*, 285 F.3d 158 (2d Cir. 2002) 10
United States v. *Goodwin*, 457 U.S. 368 (1986) 7
United States v. *Hall*, 85 F.3d 367 (8th Cir. 1996) 10
United States v. *Lentz*, 383 F.3d 191 (4th Cir. 2004), cert. denied, 544 U.S. 979 (2005) 10
United States v. *Lloyd*, 269 F.3d 228 (3d Cir. 2001) 10
United States v. *Olano*, 507 U.S. 725 (1993) 7, 11, 12
United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985) 8
United States v. *Ronda*, 455 F.3d 1273 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327, and 127 S. Ct. 1338 (2007) 8, 9
United States v. *Rowe*, 906 F.2d 654 (11th Cir. 1990) 9
United States v. *Scull*, 321 F.3d 1270 (10th Cir.), cert. denied, 540 U.S. 864 (2003) 11
United States v. *Simtob*, 485 F.3d 1058 (9th Cir. 2007) .. 11
United States v. *Sylvester*, 143 F.3d 923 (5th Cir. 1998) 9
United States v. *Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996), cert. denied, 519 U.S. 1128, and 519 U.S. 1129 (1997) 9
United States v. *Zelinka*, 862 F.2d 92 (6th Cir. 1988) 8
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9

Statute and rule: Page

21 U.S.C. 846 1
Fed. R. Crim. P. 52(b) 11

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 481 F.3d 44.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2007. The petition for a writ of certiorari was filed on July 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to possess 50 or more grams of cocaine base with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 240 months of impris-

onment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner was the New York City supplier of cocaine base to a drug distribution ring that operated out of Cape Cod, Massachusetts. Every 10 to 14 days, members of the ring would drive to New York and obtain approximately 500 grams of cocaine base from petitioner. Several of these transactions took place in a red van. Pet. App. 3a-5a; Gov't C.A. Br. 3-7.

2. On the third day of trial, a law enforcement officer testified that he had seen some of the courtroom spectators in the red van while it was parked outside the courthouse. During a break, a juror reported to the court that she and another juror had seen one of the identified spectators make "a throat-slitting gesture" on the previous day of trial. Pet. App. 5a. The court raised the issue with the parties outside the jury's presence, and defense counsel informed the court that the person who made the gesture—whom the court described as an "obviously frail appearing, old man"—was petitioner's grandfather. *Id.* at 5a-6a. The court barred the man and his wife from the courtroom and ordered them to stay away from the courthouse. *Id.* at 5a.

Petitioner moved for a mistrial. The court proposed questioning the two jurors who had seen the gesture, but defense counsel expressed concern that doing so would only highlight the issue. When trial resumed, the court informed the jury that "[a] matter" had been raised and that the court had "taken care of it completely." Pet. App. 6a. The court stated: "Put it out of your mind. It has nothing to do with this case." *Ibid.* The court did not inform the jury that the man who made the gesture was petitioner's grandfather, and it admonished the jurors not to discuss the case amongst themselves. *Ibid.*

Petitioner later submitted a written mistrial motion. On the fourth day of trial, the court denied that motion, but granted the parties' joint request that it question separately the two jurors who had seen the gesture. Pet. App. 6a. Both jurors acknowledged discussing the matter with the other jurors before being instructed not to do so by the court. 5/09/05 Tr. 75, 83-84. The jurors testified that they would be able to remain impartial notwithstanding the incident, *id.* at 77, 85, and the court specifically found that the juror who made the initial report had been forthcoming, *id.* at 79. The court again denied the motion for a mistrial. Pet. App. 7a.

On the fifth day of trial, and at petitioner's request, the court separately questioned each of the remaining jurors. None had seen the gesture, though all but one reported hearing about it. All of the jurors testified that the only discussions about the incident took place before the initial report to the court, and that they could be fair and impartial despite the incident. Pet. App. 7a. Although some of the jurors expressed concerns about the gesture, "no juror expressed fear for his or her safety" after being informed about the corrective measures taken by the court. *Id.* at 8a. The court again denied petitioner's motion for a mistrial. The jury found petitioner guilty, and the district court denied petitioner's post-verdict motion for a new trial. *Ibid.*

At sentencing, the district court determined that petitioner's advisory Guidelines range was 235-293 months of imprisonment. 3/30/06 Tr. 6. The court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. *Id.* at 27. The court found that petitioner was "the supplier in a massive drug distribution ring of crack cocaine," which it described as "one of the most addictive dangerous sub-

stances known to our society." *Id.* at 28. The court determined that 20 years of imprisonment was "a just and appropriate sentence incurring both general and specific deterrence." *Ibid.* The court also stated that its sentence took rehabilitation "into account, but it does not emphasize rehabilitation due to the nature of the offense." *Ibid.* The court described petitioner's family circumstances as "tragic," but stated that those circumstances had been "caused by" petitioner's own conduct. *Ibid.*; see *id.* at 28-29 ("You were not vulnerable. No one was twisting your arm.").

3. The court of appeals affirmed. Pet. App. 1a-27a. With respect to the throat-slitting gesture, the court rejected petitioner's claim, raised for the first time on appeal (*id.* at 10a & n.6), that he was entitled to a presumption of prejudice under *Remmer* v. *United States*, 347 U.S. 227 (1954). Although it acknowledged "an ongoing debate in the circuits about the limits on and the ongoing vitality of the presumption of prejudice rule announced in *Remmer*," the First Circuit stated that its previous decisions had "already rejected [petitioner's] argument that the *Remmer* presumption applies to all claims of juror bias resulting from extraneous contacts." Pet. App. 10a-11a. The court of appeals determined that no presumption was appropriate here because "the gesture did not come from the prosecution and was not an effort to put evidence in front of the jury." *Id.* at 12a. The court also stated that there "are different considerations at play when a defendant attempts to vacate a conviction, in the face of overwhelming evidence of guilt, on the basis that someone associated with the defense made an improper gesture to the jury," because "we would not want to create an incentive for such gesturing." *Ibid.*

Having concluded that no presumption of prejudice was warranted, the court of appeals further held that the district court had not abused its discretion in handling the incident. The district court had "followed every step in the procedure" set forth in the court of appeals' previous decisions, and there was "no realistic objection to the process it used." Pet. App. 13a. The court had taken "immediate remedial action" by barring the man and his wife from the courtroom and instructing the jurors not to be concerned about or discuss the incident. *Id.* at 15a. Several jurors later testified that the jury followed those instructions, and "if jurors say they have followed instructions, their statements are credited." *Ibid.* Finally, the district court questioned all of the jurors "and concluded that each could be impartial." *Ibid.* The court of appeals acknowledged that there are "extreme cases in which jurors' responses will not be credited," but "disagree[d]" with petitioner's assertion that this was such a case. *Id.* at 16a. The district court, it stated, had "responded sensitively and correctly" to the incident. *Ibid.*

The court of appeals also held that the district court's 240-month sentence was reasonable. Pet. App. 26a-27a. The court "disagree[d] with [petitioner's] assertion that the district court did not consider his particular potential for rehabilitation," stating that it understood the district court to have said "that given the particulars of [*petitioner's*] offense, not drug offenses *in general*, the court did not think rehabilitation particularly likely." *Id.* at 27a n.16.

ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals' ruling that a presumption of prejudice did not

apply to the jury's exposure to the throat-slitting gesture conflicts with decisions from other courts of appeals. This case does not present a suitable vehicle to resolve any disagreement among the circuits with respect to whether a jury's exposure to such extraneous influences must be presumed to be prejudicial. Petitioner did not urge the district court to apply a presumption of prejudice in this case, and the outcome would be the same regardless of the circuit in which it arose, because any presumption would have been rebutted on this record. Accordingly, this Court's review is not warranted.

In *Remmer* v. *United States*, 347 U.S. 227 (1954), a defendant who had been convicted on criminal charges sought a new trial after learning that, during trial, a third party had attempted to bribe a juror and the district court had initiated an FBI inquiry into the matter. *Id.* at 228. This Court did not hold that a new trial was automatically required because of that external influence on the juror. Rather, the Court remanded the case to the district court "with directions to hold a hearing to determine whether the incident complained of was harmful to the [defendant]." *Id.* at 230. In so holding the Court observed that, "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Id.* at 229. The Court added that the presumption, although "not conclusive," places the burden on the government "to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Ibid.*

More recently, this Court has declined to apply a presumption of prejudice to other claims of jury irregularities. In *Smith* v. *Phillips*, 455 U.S. 209 (1982), the Court held that the proper remedy in a case in which a juror had applied for a position in the prosecutor's office during trial was "a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215; see *id.* at 217 ("due process does not require a new trial every time a juror has been placed in a potentially compromising situation"). In refusing to presume prejudice, the Court explained that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Ibid.*

Likewise, in *United States* v. *Olano*, 507 U.S. 725 (1993), the Court, on plain-error review, declined to apply any presumption of prejudice when alternate jurors were improperly present during jury deliberations. *Id.* at 737-740. The Court held that no new trial was required in light of a post-verdict inquiry that showed that the alternate jurors did not participate in the deliberations. *Id.* at 740-741.[1]

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[1] The Court's limitation of the *Remmer* presumption, and its refusal to apply it where the circumstances do not warrant, is consistent with the Court's limitation of the presumption of vindictiveness announced in *North Carolina* v. *Pearce*, 358 U.S. 711 (1969). "While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have * * * limited its application, like that of other judicially created means of effectuating rights secured by the Constitution, to circumstances where its objectives are thought most efficaciously served." *Alabama* v. *Smith*, 490 U.S. 794, 799 (1989) (internal quotation marks, brackets, and citations omitted) (refusing to apply a presumption where vindictiveness was not more likely than not); see also *Texas* v. *McCullough*, 475 U.S. 134, 137-140 (1986); *United States* v. *Goodwin*, 457 U.S. 368 (1986). As in the context of the Court's jury "intrusion" jurisprudence, *Olano*, 507 U.S. at 738, in the

The courts of appeals have taken somewhat divergent positions on whether, or to what extent, *Remmer*'s presumption of prejudice survives *Phillips* and *Olano*. The First Circuit, in which this case arose, has held that "the presumption is applicable only where there is an egregious tampering or third party communication which directly injects itself into the jury process." *United States* v. *Boylan*, 898 F.2d 230, 261, cert. denied, 498 U.S. 849 (1990); see *United States* v. *Bradshaw*, 281 F.3d 278, 287-298 (1st Cir.) (Pet. 12), cert. denied, 537 U.S. 1049 (2002). No such conduct was involved in this case. As the court of appeals explained, "the gesture did not come from the prosecution and [it] was not an effort to put evidence before the jury." Pet. App. 12a. In addition, the court of appeals correctly stated that "different considerations [are] at play when a defendant attempts to vacate a conviction, in the face of overwhelming evidence of guilt, on the basis that someone associated with the defense made an improper gesture to the jury." *Ibid.*

The First Circuit's position that a presumption of prejudice does not apply to every extraneous influence on a jury is consistent with the positions of most other circuits that have considered the issue since *Phillips* and *Olano*. One circuit has held that the presumption no longer exists. *United States* v. *Pennell*, 737 F.2d 521, 532-533 (6th Cir. 1984) (Pet. 13), cert. denied, 469 U.S. 1158 (1985); see *United States* v. *Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988). Two other circuits have expressly reserved the question. *King* v. *Bowersox*, 291 F.3d 539, 541 (8th Cir.), cert. denied, 537 U.S. 1093 (2002); *United*

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absence of a presumption, it remains open to a defendant to establish actual prejudice, *id.* at 741. See *Smith*, 490 U.S. at 831 ("actual vindictiveness").

States v. *Ronda*, 455 F.3d 1273, 1299 n.36 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327, and 127 S. Ct. 1338 (2007).[2]

Other circuits agree with the First Circuit that whether a presumption of prejudice should be applied depends on the circumstances. Two circuits have instructed trial courts not to presume prejudice automatically, but instead to inquire "whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness." *United States* v. *Williams-Davis*, 90 F.3d 490, 497 (D.C. Cir. 1996) (Pet. 13) (citation omitted), cert. denied, 519 U.S. 1128, and 519 U.S. 1129 (1997) (Pet. 12); see *United States* v. *Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (Pet. 12) (quoting *Williams-Davis*, 90 F.3d at 497). Another circuit has confined the presumption to cases similar to *Remmer* itself, *i.e.*,

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[2] In *McNair* v. *Campbell*, 416 F.3d 1291 (2005) (Pet. 11), cert. denied, 547 U.S. 1073 (2006), the Eleventh Circuit applied a presumption of prejudice when a member of a jury had "brought a Bible into the jury room during deliberations, read aloud from it, and led the other jurors in prayer." *Id.* at 1301; see *id.* at 1307. In *Ronda*, which was decided after *McNair*, the Eleventh Circuit acknowledged a possible conflict between decisions like *McNair* and two other decisions that "stated that prejudice is not presumed even when jurors considered extrinsic evidence," but declined to resolve the tension because "[e]ven granting Appellants the presumption of prejudice, we conclude that the government has sufficiently rebutted that presumption." *Ronda*, 455 F.3d at 1299 n.36 (citing *United States* v. *Rowe*, 906 F.2d 654, 656-657 (11th Cir. 1990), and *United States* v. *De La Vega*, 913 F.2d 861, 870 (11th Cir. 1990), cert. denied, 500 U.S. 916 (1991)). Any intra-circuit conflict, however, would be a matter for the Eleventh Circuit to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

those that involve direct jury tampering or other serious intrusion into the jury process. *United States* v. *Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (stating that the presumption applies "when the extraneous information is of a considerably serious nature," such as "when a juror is directly contacted by third-parties"); see *United States* v. *Console*, 13 F.3d 641, 666 (3d Cir. 1993) (Pet. 11) (applying presumption to direct communication between third party and juror during deliberations), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994). Although the Eighth Circuit has more recently reserved the question of whether the *Remmer* presumption survives this Court's decisions in *Phillips* and *Olano*, see *King*, 291 F.3d at 541, it has held that the presumption does not apply in any event unless an "extrinsic contact relates to factual evidence not developed at trial." *United States* v. *Hall*, 85 F.3d 367, 371 (1996) (internal quotation marks and citation omitted). The Fourth Circuit has stated that "the presumption is not one to be casually invoked" and does not apply "every time a third party communication reaches the ears of a juror during trial." *Stockton* v *Virginia*, 852 F.2d 740, 744-745 (1988), cert. denied, 489 U.S. 1071 (1989).[3]

Other circuits, however, read *Remmer* to require a presumption of prejudice whenever a jury is exposed to any external information. The Second Circuit presumes that "any extra-record information of which a juror becomes aware" is prejudicial. *United States* v. *Greer*, 285 F.3d 158, 173 (2002) (Pet. 11). The Ninth Circuit applies a presumption of prejudice "[w]hen there has been any

[3] In *United States* v. *Lentz*, 383 F.3d 191, 219 (2004) (Pet. 11), cert. denied, 544 U.S. 979 (2005), the Fourth Circuit applied a presumption of prejudice when a day planner that had not been admitted into evidence was left in the jury room during deliberations.

improper contact with a juror or any form of jury tampering—whether direct or indirect." *United States* v. *Simtob*, 485 F.3d 1058, 1064 (2007) (Pet. 11). And the Tenth Circuit applies the presumption "[w]hen members of a jury are exposed to extraneous information about a matter pending before the jury[.]" *United States* v. *Scull*, 321 F.3d 1270, 1280, cert. denied, 540 U.S. 864 (2003).

This is not an appropriate case in which to resolve any inter-circuit tension concerning the continuing existence or scope of the *Remmer* presumption. Petitioner did not ask the district court to apply a presumption of prejudice, and the district court did not address whether any such presumption should be applied in the circumstances of this case. Thus, although the issue was raised and addressed in the court of appeals, Pet. App. 10a & n.6, it is governed by the plain-error rule, Fed. R. Crim. P. 52(b), under which petitioner cannot prevail unless he can establish "obvious" error that affects his substantial rights and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 734-737. In view of the narrowing of the contexts in which the *Remmer* presumption applies, particularly in the First Circuit, the district court did not commit obvious error in failing to apply a presumption of prejudice. Moreover, the "overwhelming" character of the evidence of guilt and the fact that the gesture was made by "someone associated with the defense," Pet. App. 12a, would surely deserve serious weight before a court could exercise its discretion to apply a presumption and overturn a verdict of a jury whose members affirmed their impartiality and who were protected by curative measures. See *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997) (error in omitting element of offense from

jury instructions did not seriously affect judicial integrity, and thus did not warrant plain error relief, when the evidence regarding the issue was "overwhelming" and "essentially uncontroverted").

In addition, the facts were not developed to permit complete assessment of petitioner's claim that this case involves jury "tampering" (Pet. 16), because "two jurors saw a man make a physically threatening throat-slitting gesture toward them." Pet. 15; see Pet. 3 (asserting that the gesture was made "toward the jury"). Neither of the two jurors who actually saw the gesture testified that she thought it was directed at her or the jury as a whole, 5/09/05 Tr. 72-87, and the district court stated that it was "not at all prepared to conclude that this was a gesture made to the jurors," 7/20/05 Tr. 6.[4]

In any event, petitioner cannot show that this case would be resolved differently if a presumption of prejudice were applied. As this Court noted in *Olano*, "a presumption of prejudice * * * does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" 507 U.S. at 739. Here, upon learning of the gesture, the district court banished the man in question from the courtroom, delivered several emphatic curative instructions, and conducted a probing inquiry of each juror. See *Phillips*, 455 U.S. at 215 ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). Having inquired of all of the jurors and witnessed their demeanor, the district court was entitled to accept the jurors' assurances of impartiality.

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[4] In addition, although petitioner asserts (Pet. 6-7, 15) that six jurors expressed "fears and concerns" (Pet. 6), the court of appeals stated that "no juror expressed fear for his or her safety" after being informed of the corrective measures taken by the district court. Pet. App. 8a.

See *id.* at 217 n.7 (rejecting claim that juror testimony in *Remmer*-type hearings is "inherently suspect," because "surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter") (quoting *Dennis* v. *United States*, 339 U.S. 162, 171 (1950)). Accordingly, even if a presumption of prejudice were applied in this case, petitioner would not ultimately be entitled to any relief.

2. Petitioner also contends (Pet. 18-22) that his 240-month sentence, which was within the advisory Guidelines range, was unreasonable under *United States* v. *Booker*, 543 U.S. 220 (2005), because the district court failed to consider his amenability to rehabilitation. The court of appeals rejected petitioner's interpretation of the district court's sentencing order, viewing the court as having stated "that given the particulars of [*petitioner's*] offense," rehabilitation was "not * * * particularly likely." Pet. App. 27a n.16. Nor does petitioner raise any claim that implicates this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007). Although petitioner's sentence is within the advisory Guidelines range, neither the district court nor the court of appeals treated that fact as dispositive and both concluded that petitioner's sentence was reasonable. Pet. App. 27a; 3/30/06 Tr. 28-29. Finally, although petitioner's offense involved cocaine base, petitioner raises no issue concerning the quantity-based disparity between crack and powder cocaine and thus cannot claim that this case is likely to be affected by this Court's decision in *Kimbrough* v. *United States*, No. 06-6330 (argued Oct. 2, 2007). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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